IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1208 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

@

MAHUKAR KESHAVRAO GAIKWAD

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 1208 of 2001
MS DR KACHHAVAH for Petitioner No. 1
GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 25/07/2001

ORAL JUDGEMENT

Heard learned advocate Ms. Kachhavah for the petitioner and the learned AGP Mr. Jani for the respondents. In this petition under Article 226 of the the Constitution of India, the petitioner has challenged the impugned order of detention dated 3.1.2001 passed by the detaining authority whereunder the petitioner has been ordered to be detained at the District Jail at

Bhavnagar as Class II detenu. According to the grounds of detention communicated to the petitioner under section 9(1) of the Gujarat Prevention of Anti Social Activities Act, in all, three offences have been registered against the petitioner under the provisions of the Bombay Prohibition Act wherein last offence registered is dated 3rd September, 2000 and the impugned order of detention has been passed by the detaining authority 3.1.2001. The statements of the secret witnesses as recorded on 30.12.2000 and 31st December, 2000 were verified by the detaining authority on 2nd January, 2001 and on the next day i.e. 3rd January, 2001, impugned order has been passed by the detaining authority. Three unregistered offences have been noted by the detaining authority while relying upon the statements of the secret witnesses dated 1st December, 2000 and 8th November, 2000. The petitioner was enlarged on bail by the competent court in connection with the registered offences against him. The respondents have filed reply to the present petition.

2. Learned advocate Ms. Kachhavah has raised various contentions while challenging the impugned order of detention. She has submitted that after verifying the statements of the secret witnesses on 2.1.2001, on the next day, impugned order of detention has been passed and, therefore, it amounts to non application of mind on the part of the detaining authority. She has submitted that the detaining authority has passed the impugned order of detention in mechanical manner. According to her, the respondent authorities have passed the impugned order of detention without examining the genuineness or otherwise of the statements of secret witnesses in mechanical and routine manner. According to her, claim of privilege under section 9(2) of the PASA Act is not genuine and bona fide and such claim has deprived the detenu of his right to make an effective representation. According to her, mere verification of the statements of the secret witnesses by calling upon the witnesses is not enough but the detaining authority is required to examine as to whether the facts stated in such statements are true and correct or not. According to her, such verification is not an idle formality and the detaining authority has to examine the facts and not to examine or verify the person. She has submitted that the petitioner has raised specific contentions to that effect in para 14 and 19 of the memo of petition. She has relied upon the following decision:

1. Ranubhai Bhikhabhai Bharwad (Vekaria) versus
State of Gujarat reported in 2000(3) GLR page

2696.

Learned AGP Mr. Jani has supported the impugned order of detention and has submitted that there were compelling circumstances available with the detaining authority to detain the detenu under the PASA Act. He has submitted that specific reply has been given in para 11 and 15 of the affidavit in reply. He has submitted that there is no non application of mind as alleged. The detaining authority, after verifying the statements of the secret witnesses, was subjectively satisfied that there is no option but to detain the petitioner to prevent him from indulging into similar activities affecting the maintenance of public order and, therefore, the detaining authority was right in passing the impugned order of detention and therefore, this Court should not interfere with the same and therefore, this petition is required to be dismissed.

I have considered the arguments of the learned advocates for the respective parties. I have considered the contentions raised by the learned advocate for the petitioner about non application of mind on the part of the detaining authority in passing the impugned order of detention. I have also appreciated the contention that the statements of the secret witnesses were verified by the detaining authority on 2.1.2001 and on the very next date i.e. 3.1.2001 the impugned order of detention was passed and, therefore, there was no sufficient time with the detaining authority to examine and verify the statements and other material for the purpose of recording subjective satisfaction and it therefore amounts to non application of mind on the part of the detaining authority. Looking to para 3 of the grounds of detention, privilege has been claimed by the detaining authority only relying upon the statements of the secret witnesses but there was no other aspect considered by the detaining authority. Therefore, according to my view, the detaining authority has passed the impugned order without examining the genuineness of the factual aspect narrated by the secret witnesses in their respective statements and therefore, claim of privilege under sec. 9(2) of the PASA Act has deprived the petitioner of his right to make an effective representation .

I have also considered the decision reported in 2000(3) GLR page 2696. Relevant observations are as under:

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659, the Court observed:

The statements of the three witnesses in the instant case which were recorded before the [police inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August, 1999 the detention order has been passed. (Para. 9).

The manner in which the verification has been recorded of the made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in as much as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power u/S. 9(2) and it is established that in such case the wrong exercise of power u/S. 9(2) adversely affects detenu's right of making an effective representation guaranteed under Article 22(5) of the Constitution of India. (Para. 9).

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege u/S. 9(2) of the PASA Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

In case of Chandrakant N. Patel versus State of Gujarat and Ors. reported in 1994 (1) GLR 761, it has been held by the Division Bench this Court as under:

"The decisions can be said to be a conflict with each other, if the ratio of the decisions is inconsistent. Merely because some observations made in one decision appear to be inconsistent with some observations made in the other decision, it cannot be said that the ratio of the two decisions is in conflict with each other. Before it can be said that the two decisions are inconsistent, it will be necessary to appreciate the context in which such observations have been made and whether they form the ratio of the decisions (Para 2)

There is no inconsistency between the ratio of the Division Bench decision in the case of Bal Krishna (1956(58) BLR 614) and the ratio of the decision of the division bench in the case of Bai Amina (1981 GLR 1186). We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. As stated above, the observations which

have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as proper application of mind to all the relevant aspects, what can be regarded as proper application of mind to all relevant aspects, what can be regarded as sufficient for the purpose of claiming privilege, and when exercise of privilege can be regarded as bonafide. Whether that privilege has been exercised bona fide and properly or not obviously will have to be decided in each case by reference to the facts of that case. Considering the law relating to preventive detention, the nature of the right conferred on the detenu and the circumstances under which that right can be adversely affected, we do not think that what has been held in Bai Amina's case is not good law. Whether the detaining authority can be said to have applied its mind to all the relevant aspects properly or not would be a question of fact in each case and will have to be decided with reference to the facts of that case. Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then, it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu." (para 7)

Looking to the observations made in the aforesaid decisions and also in view of the facts and circumstances of the present case, according to my opinion, the impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the

petition succeeds and the same is allowed. The order of detention dated 3.1.2001 is vitiated and resulted to quash and set aside. The detenu Madhukar Keshavrao Gaikwad who has been detained at the Bhavnagar Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

25.7.2001. (H.K. Rathod,J.)
Vyas